No. 89-728

(2)

Supreme Court, U.S.
FILED
JAN 18 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FIRST UNITED METHODIST CHURCH OF HYATTSVILLE,
Petitioner,

v.

UNITED STATES GYPSUM COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF RESPONDENT UNITED STATES GYPSUM COMPANY IN OPPOSITION

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January 18, 1990

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QUESTIONS PRESENTED

1. Whether a state statute of repose is preempted by 42 U.S.C. § 9658, which addresses state statutes of limitations?

2. Whether the courts below erred in concluding that the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) 42 U.S.C. § 9601 *et seq.*, *as amended*, was not intended to cover the removal from buildings of an installed useful product, a minor constituent of which was asbestos?

3. Whether the enactment of 42 U.S.C. § 9658 so as to partially preempt state statutes of limitations for state law causes of actions is violative of the Tenth Amendment to the United States Constitution?

4. Whether a statute of repose, which grants a substantive right to be free from stale lawsuits, may be preempted retroactively to revive potential liabilities that the statute had expressly extinguished?

LIST OF INTERESTED PARTIES

The following parties appeared before the United States Court of Appeals for the Fourth Circuit in the proceedings below:

First United Methodist Church of Hyattsville
United States Gypsum Company

USG Corporation is the parent company of United States Gypsum Company. The following corporations are non-wholly-owned affiliates of respondent United States Gypsum Company:

American Metals Corporation
BHI International, Inc.
C-S-W Drywall Supply Company
C.N.G. Distribution Limited
CGC Inc.
CIKSA, S.A. de C.V.
Construcciones, Recubrimientos
Y Acabados S.A. de C.V.
DAP Canada
DAP Inc.
Darswan, Inc.
Donn Australia
Donn Canada Ltd.
Donn Far East SDN BHD
Donn France S.A.
Donn International, Inc.
Donn International Sales Corp.
Donn Pacific Ltd.
Donn Products (U.K.) Ltd.
Donn Products GmbH
Donn South Africa (Pty) Limited
Gypsum Communications Co.
Gypsum Energy Management Co.
Gypsum Transportation Ltd.
L & W Supply Corporation
Little Narrows Gypsum Co.

Marstrat, Inc.
North Baldwin Park Corp. (formerly Hollytex)
101 South Wacker Co.
Panama Gypsum Company, Inc.
Panama Wallboard, Inc.
Sequoyah Carpet Corp.
Stocking Specialists, Inc.
USG Enterprises, Inc.
USG Foreign Investments, Ltd.
USG Foreign Sales Corp.
USG Industries, Inc.
USG Interiors, Inc.
USG International, Ltd. (DISC)
USG Properties, Inc.
United States Gypsum Export Company
Westbank Planting Company
Westlake Land (Canada) Ltd.
Windsor Shipping Limited
Wiss, Janney, Elstner Associates, Inc.
Yeso Mexicano S.A.
Yeso Panamericano, S.A. de C.V.
Yesomet, S.A. de C.V.

RULE 29.4 STATEMENT

If, as Petitioner urges, the provisions of 42 U.S.C. § 9658 are apposite to this case, 28 U.S.C. § 2403(a) may be applicable. No court of the United States, as defined by 28 U.S.C. § 451, has certified to the Attorney General the fact that the constitutionality of an Act of Congress may be drawn into question.

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No. 89-728

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UNITED STATES GYPSUM COMPANY,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF RESPONDENT UNITED STATES GYPSUM COMPANY IN OPPOSITION

Respondent United States Gypsum Company respectfully submits this Brief in Opposition to the Petition of First United Methodist Church of Hyattsville for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming the judgment of the United States District Court for the District of Maryland.

STATUTES IN QUESTION

The state statute upon which judgment was entered in favor of United States Gypsum Company was the applicable Maryland statute of repose, Md. Cts. & Jud. Proc. Code § 5-108(a):

§ 5-108. Injury to person or property occurring after completion of improvement to realty.

(a) Injury occurring more than 20 years later—Except as provided by this section, no cause of action for damages accrues and a person may not seek contribution or indemnity for damages incurred when wrongful death, personal injury, or injury to real or personal property resulting from the defective and unsafe condition of an improvement to real property occurs more than 20 years after the date the entire improvement first becomes available for its intended use.

The federal statute which petitioner urges preempts the Maryland statute of repose is 42 U.S.C. § 9658 which provides, in pertinent part, as follows:

§ 9658. Actions under State law for damages from exposure to hazardous substances.

(a) State statutes of limitations for hazardous substance cases

(1) Exception to state statutes

In the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility, if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute.

(2) State law generally applicable

Except as provided in paragraph (1), the statute of limitations established under State law shall apply in all actions brought under State

law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility.

* * * *

(b) Definitions

As used in this section—

* * * *

(2) Applicable limitations period

The term "applicable limitations period" means the period specified in a statute of limitations during which a civil action referred to in subsection (a)(1) of this section may be brought.

(3) Commencement date

The term "commencement date" means the date specified in a statute of limitations as the beginning of the applicable limitations period.

(4) Federally required commencement date

(A) In general

Except as provided in subparagraph (B), the term "federally required commencement date" means the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages referred to in subsection (a)(1) of this section were caused or contributed to by the hazardous substance or pollutant or contaminant concerned.

* * * *

(Pub.L. 96-510, Title III, § 309, as added Pub.L. 99-499, Title II, § 203(a), Oct. 17, 1986, 100 Stat. 1695.)

STATEMENT OF THE CASE

Petitioner First United Methodist Church of Hyattsville ("First United") owns a building located in Hyattsville, Maryland. As part of the construction of that

building which was completed in 1962, an accoustical plaster allegedly manufactured by United States Gypsum Company ("U.S. Gypsum") was installed. One of the minor constituents of the acoustical plaster was chrysotile asbestos. At the time of the construction of First United's building, all acoustical plasters contained asbestos and this fact was well known to the people who used the products. Asbestos was a unique constituent necessary to get specific characteristics in the material so that it could be handled as a wet mortar and be applied by trowel or machine.

On June 15, 1988, 26 years after the building was first available for its intended use, First United commenced suit against U.S. Gypsum in state court in Maryland. First United claimed that the acoustical plaster was unreasonably dangerous, that the installation of the acoustical plaster had damaged its building, and that under a variety of state law causes of action, First United was entitled to recover the costs of removing and replacing the plaster. [*See* Appendix, *infra*]. U.S. Gypsum removed the suit to the United States District Court for the District of Maryland pursuant to 28 U.S.C. § 1441(a).

The governing law of Maryland provides not only statutes of limitations applicable to various causes of action, but also a statute of repose which confers upon an unlimited class of persons, including manufacturers of construction products, a substantive immunity from suit on any claim for damages or injury resulting from the defective and unsafe condition of an improvement to real property which occurs more than 20 years after the improvement first becomes available for its intended use. Md. Cts. & Jud. Proc. Code § 5-108(a).[1]

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[1] Although a statute of repose bears some similarity to a statute of limitations, the two kinds of statutes are not the same. A statute of limitations begins to run upon the accrual of a cause of action (*i.e.*, time of injury or time of discovery) and bars a plaintiff's remedy if suit is not filed within the statutory period. A statute of

Based on this substantive statute of repose defense, U.S. Gypsum moved for summary judgment as to all claims based on the original installation of acoustical plaster.[2] First United opposed summary judgment, urging on a variety of grounds that the statute of repose was inapplicable. The last of First United's arguments was the argument that § 5-108 was preempted by 42 U.S.C. § 9658. The District Court carefully considered all of First United's arguments, found them lacking in merit and granted partial summary judgment. [*See* First United App., pp. 1a-11a]. The District Court thereafter directed the entry of a final judgment as to these claims pursuant to Fed. R. Civ. P. 54(b).

On appeal to the United States Court of Appeals for the Fourth Circuit, First United made multiple arguments that its claims were not barred by § 5-108, the last of which was preemption by 42 U.S.C. § 9658. The Court of Appeals considered all of First United's arguments and, addressing them in a unanimous opinion, affirmed the judgment of the District Court. [First United App., pp. 12a-25a]. No petition for rehearing was filed in the Court of Appeals and the petition to this Court followed.

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repose, however, commences with a fixed event (*i.e.*, date building is first available for its intended use) and confers rights upon potential defendants if a cause of action does not accrue within the prescribed period. *See Hilliard & Bartko Joint Venture v. Fedco Systems, Inc.*, 309 Md. 147, 522 A.2d 961, 968 (1987). Under the Maryland scheme, the two defenses are complementary rather than cumulative.

[2] Part of First United's claims relate to the installation of replacement material in 1969. This aspect of First United's claims has not been addressed by the courts below and remains pending.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE QUESTION PRESENTED FOR REVIEW AS FRAMED BY FIRST UNITED IS NOT RAISED IN THIS CASE

Former Supreme Court Rule 21.1 [3] mandated that the first item in a petition for certiorari be "[t]he questions presented for review, expressed in the terms and circumstances of the case. . . ." In its zeal to present an issue that might catch the attention of the Court, First United has failed to comply with this fundamental precept. The issue which First United has framed and which underlies all of its arguments is simply not presented in this case.

Virtually all of the discussion in First United's petition revolves around whether the 1986 amendments to Section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 28 U.S.C. § 9604(a)(3), and the legislative history thereof, reflect limitations on private cost recovery actions under Section 107 of CERCLA, 42 U.S.C. § 9607. This case does not involve Section 107 of CERCLA in any way as First United did not assert a private cost recovery claim under CERCLA. [*See* Complaint set forth in the Appendix, *infra*].

This Court should not grant a petition for certiorari to review an issue which is not presented by the case.

II. THE CERCLA RELATED QUESTION THAT IS PRESENTED BY THIS CASE DOES NOT WARRANT REVIEW BY THIS COURT

Although the CERCLA question framed by First United is not presented by this case, there is an issue presented involving the 1986 amendments to CERCLA.

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[3] First United's petition was filed on November 6, 1989, prior to the recent amendments to the Rules. This provision is now contained in Rule 14.1.

That issue is completely ignored by First United in obvious recognition that the issue does not warrant review by this Court.

The two statutory provisions relevant to the CERCLA related issue that is presented in this case were not set out verbatim in First United's petition as required by former Supreme Court Rule 21.1(f). U.S. Gypsum, however, has set forth those statutory provisions, *supra*. First United failed to set forth the applicable provisions because a mere reading of the two provisions reveals the utter sophistry of First United's CERCLA based argument in this case.

The CERCLA based argument that is presented is the assertion that 42 U.S.C. § 9658 preempts the provisions of Md. Cts. & Jud. Proc. Code § 5-108(a). Section 5-108(a) is a statute of repose, not a statute of limitations. The distinctions between a statute of limitations and a statute of repose are meaningful and were recognized by the Court of Appeals in this case:

> A statute of limitations is a procedural device that operates as a defense to limit the remedy available from an existing cause of action. *Goad v. Celotex Corp.*, 831 F.2d 508, 511 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 2871 (1988). A statute of repose creates a substantive right in those protected to be free from liability after a legislatively-determined period of time. *Id.* Statutes of limitations are motivated by considerations of fairness to defendants and are intended to encourage prompt resolution of disputes by providing a simple procedural mechanism to dispose of stale claims. *Harig v. Johns-Manville Products Corp.*, 284 Md. 70, 75, 394 A.2d 299 (1978). Statutes of repose are based on considerations of the economic best interests of the public as a whole and are substantive grants of immunity based on a legislative balance of the respective rights of potential plaintiffs and defendants struck by determining a time limit beyond which liability no longer exists.

> *Whiting-Turner*, 304 Md. at 349-50, 499 A.2d 178. * * * [A] statute of repose is typically an absolute time limit beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body. *Knox v. AC&S, Inc.*, 690 F. Supp. 752, 759 (S.D. Ind. 1988).

882 F.2d 862, 865-66 (4th Cir. 1989); First United App., p. 17a.

The 1986 amendments to CERCLA codified at 42 U.S.C. § 9658 purport to preempt state statutes of limitations *only* and do not purport to affect the substantive rights created by statutes of repose such as § 5-108(a). First United's preemption argument is patently meritless.

III. THE QUESTION OF WHETHER THE SCOPE OF CERCLA INCLUDES THE REMOVAL OF INSTALLED ASBESTOS-CONTAINING PRODUCTS IN BUILDINGS IS NOT RIPE FOR REVIEW BY THIS COURT

Aside from the reasons why this case is an improper vehicle to present the issue, the question of whether the scope of CERCLA includes the removal of asbestos-containing products is not ripe for review by this Court. This question has been addressed by only a very few courts and *all* courts which have meaningfully considered the issue have concluded that CERCLA is not applicable to an action to recover the cost of removing installed asbestos-containing products from buildings.[4]

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[4] In addition to the views of the four judges below who have addressed the issue, CERCLA has been found inapplicable to asbestos-in-buildings cases in the following cases: *Covalt v. Carey Canada, Inc.*, 860 F.2d 1434, 1438-39 (7th Cir. 1988); *Retirement Community Developers, Inc. v. Merine*, 713 F. Supp. 153, 156 (D. Md. 1989); *Prudential Ins. Co. of America v. U.S. Gypsum*, 711 F. Supp. 1244-55 (D.N.J. 1989); *Knox v. AC&S, Inc.*, 690 F. Supp. 752, 756-57 (S.D. Ind. 1988); *3550 Stevens Creek Associates v.*

Any review by this Court of the scope of CERCLA vis-a-vis asbestos removal should await further development in the lower courts.

IV. THIS COURT SHOULD NOT ACCEPT A CASE TO REVIEW THE SCOPE OF CERCLA WHERE SUBSTANTIAL COLLATERAL CONSTITUTIONAL ISSUES WILL BE IMPLICATED

The causes of action asserted by First United are solely state law claims and U.S. Gypsum's statute of repose defense is also derived from state law. Jurisdiction of this case in the federal courts is based solely on diversity of citizenship. As this Court recently noted in *Sun Oil Co. v. Wortman*, 108 S. Ct. 2117, 2123 (1988):

> "The period sufficient to constitute a bar to the litigation of sta[l]e demands, is a question of municipal policy and regulation, and one which belongs to the discretion of every government consulting its own interest and convenience."

The Court further held that "[á] State's interest in regulating the work load of its courts and determining when a claim is too stale to be adjudicated certainly suffices to give it legislative jurisdiction to control the remedies

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Barclays Bank of California, Civil Action No. C-87-20672—RPA (Unpublished Slip. Op., N.D. Cal., Sept. 28, 1988) (appeal pending); *School Bd. of Norfolk v. U.S. Gypsum*, Civil Action No. 86-450-N (Unpublished Bench decision, E.D. Va., Nov. 3, 1986); *Corporation of Mercer University v. Nat'l Gypsum Co.*, 24 Envt. Rep. Cas. (BNA) 1953, 1960-61 (M.D.Ga. 1986). In *Dayton Independent School District v. U.S. Mineral Products Co.*, Civil Action No. B-87-507-CA (E.D. Tex., March 11, 1989), the District Court without opinion denied a motion to dismiss the CERCLA claim in an asbestos-in-buildings case, but immediately certified the issue for interlocutory appeal to the Fifth Circuit which accepted the certification and docketed the appeal as No. 89-2734. Thereafter, in recognition of unanimous contrary authority, the plaintiff sought and was granted leave by the District Court to amend its Complaint to drop the CERCLA claim. The Fifth Circuit has not ruled on the plaintiffs' motion to dismiss the appeal as moot.

available in its courts by imposing statutes of limitations." *Id.* at 2126. State statutes of limitations reflect "the State's judgment on the proper balance between the policies of repose and the substantive policies of enforcement embodied in the state cause of action." *Wilson v. Garcia*, 471 U.S. 261, 271 (1985). State policies of repose are not disfavored in federal law. *Board of Regents v. Tomanio*, 446 U.S. 478, 488 (1980).

If the Maryland statute of repose set forth in § 5-108 and the 1986 amendments to CERCLA codified at 42 U.S.C. § 9658 are construed such that the former is preempted by the latter, substantial constitutional questions arise under a variety of provisions, including the Tenth Amendment. Congress may not interfere with the power of the states unless such power is specifically authorized by the Constitution. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 549 (1985). There is no such constitutional authorization. In entertaining state claims, federal courts are constitutionally obligated to apply state law. *Felder v. Casey*, 108 S. Ct. 2302, 2313 (1988).

Additionally, since the immunity from suit conferred by § 5-108(a) is a substantive right which vested in 1982, any application of 42 U.S.C. § 9658 (enacted in 1986) in this case would violate due process. *See William Danzer & Co. v. Gulf & Ship Island R.R.*, 268 U.S. 633 (1925); *see also School Bd. of Norfolk v. U.S. Gypsum*, 234 Va. 32, 360 S.E.2d 325 (1987).

The substantial constitutional questions which are implicated in the circumstances of this case militate against granting certiorari to review the scope of CERCLA now.

CONCLUSION

First United has not presented special and important reasons why the Court should review this case on writ of certiorari. The petition should be denied.

Respectfully submitted,

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January 18, 1990

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APPENDIX

APPENDIX

IN THE CIRCUIT COURT OF
PRINCE GEORGE'S COUNTY, MARYLAND

Civil Action No. CAL 88-09665

FIRST UNITED METHODIST CHURCH OF HYATTSVILLE
6201 Belcrest Road
Hyattsville, Maryland 20782,
Plaintiff,

v.

UNITED STATES GYPSUM COMPANY
101 South Wacker Drive
Chicago, Illinois 60606,
Defendant.

COMPLAINT

Plaintiff, the First United Methodist Church of Hyattsville, by its attorneys, Ashcraft & Gerel, as and for its complaint herein, avers:

NATURE OF THE ACTION

1. This action is brought by plaintiff, the First United Methodist Church of Hyattsville ("the Church"), to recover sums of money expended to remove defendant United States Gypsum Company's ("USG") asbestos-containing acoustical plaster ceiling material from its building, which is owned by the Church and is located at 6201 Belcrest Road in the City of Hyattsville, Maryland. As set forth with greater particularity below, USG manufactured, sold, and distributed to the Church in this judicial district certain asbestos-containing acoustical

plaster material, specifically for use in the construction of the Church, and in so doing misrepresented the nature of this material and failed to warn the Church of its inherently dangerous characteristics.

PARTIES

2. The Church is an non-profit organization incorporated under the laws of the State of Maryland.

3. USG is a corporation organized under the laws of Delaware with its principal place of business in Illinois and has conducted and transacted business in the State of Maryland and in this judicial district.

ALLEGATIONS COMMON TO ALL COUNTS

4. In the 1930's USG began the manufacture, sale and distribution of asbestos-containing products.

5. In 1955, USG began the manufacture of spray-applied asbestos-containing acoustical plaster products.

6. USG advertised its asbestos-containing acoustical plaster products in the Sweets Catalogue, a reference material used by architects and others involved with the design and construction of buildings.

7. Neither USG's asbestos-containing acoustical products nor its advertisements carried precautionary health warnings of any kind.

The Application of USG's Asbestos-Containing Acoustical Plaster in the Construction of the First United Methodist Church of Hyattsville

8. In or about 1961, construction of the Church building commenced.

9. Officers and agents of USG represented to the Church and its agent that its asbestos-containing acoustical plaster products were suitable and desirable for use as ceiling material in the Church.

10. Agents of USG represented to the Church's architect and agent, A. Hensel Fink, that its asbestos-containing acoustical plaster was suitable and desirable for use as ceiling material in the Church.

11. In reliance upon such representations by USG, the Church agreed to, and in fact did, employ USG's acoustical plaster material in the construction of the Church. In or about 1962, USG's asbestos-containing acoustical plaster was applied to the ceilings of the Church building by Kidwell & Kidwell Corporation, a plaster subcontractor.

12. In or about 1969, a portion of the acoustical ceiling was replaced. USG's asbestos-containing acoustical plaster was used as the replacement material.

13. By means of the acts of its agents and representatives alleged herein, USG purposefully availed itself of the privilege of conducting activities within Maryland, and

(a) contracted to supply the acoustical plaster used at the Church;

(b) transacted the business of the sale, distribution and application of acoustical plaster in Maryland, specifically for use at the Church.

14. By means of the acts of its agents and representatives alleged herein, USG committed the tortious acts herein complained of in the State of Maryland.

15. By means of the acts of its agents and representatives alleged herein, USG created and controlled a distribution system for asbestos-containing acoustical plaster, through it sought to and succeeded in delivering substantial amounts of this material for use in the State of Maryland, and thereby;

(a) reguraly did or solicited business, or engaged in some other persistent course of conduct, or de-

rived substantial revenues from goods used or services rendered in the State of Maryland, and

(b) expected or reasonably should have expected the tortious acts herein complained of to have consequences in the State of Maryland, and derived and continues to derive substantial revenue from interstate or international commerce.

COUNT I: STRICT LIABILITY

16. The Church repeats and realleges each and every allegation contained in Paragraphs 1 through 15 as if fully set forth herein.

17. USG defectively designed and manufactured the acoustical plaster applied in the Church.

18. The accoustical plaster applied in the Church was defective at the time it left the possession of USG.

19. USG's acoustical plaster was also defective and unreasonably dangerous as it was not accompanied by adequate and proper warnings.

20. USG's acountical plaster applied in the Church created an asbestos-containing dust that posed a health hazard to the occupants of the Church.

21. The presence of USG's acoustical plaster also created a health hazard to maintenance and custodial personnel and the general public who frequented the Church.

22. As a direct and proximate result of the defective, unsafe, and unreasonably dangerous condition of USG's acoustical plaster, the Church's property rights were damaged and the Church has incurred loss and damage including, *inter alia*: (a) the cost of removing and replacing USG's asbestos-containing product on its premises; and (b) the loss of the use of its building.

COUNT II: NEGLIGENCE

23. The Church repeats and realleges each and every allegation contained in Paragraphs 1 through 22 as if fully set forth herein.

24. USG willfully, recklessly and negligently sold the acoustical plaster used in the Church.

25. USG knew or should have known that its acoustical plaster was a dangerous and hazardous product and was not suitable for use in any structure.

26. USG willfully, recklessly and negligently misrepresented the inherent characteristics of its acoustical plaster and made the misrepresentations, *inter alia*, that it was desirable and suitable for use in the Church.

27. USG willfully, recklessly and negligently failed to warn or advise the Church of the dangers and hazards inherent in its acoustical plaster.

28. USG since at least the 1930's has possessed medical and scientific data which clearly indicate that asbestos and asbestos-containing materials are hazardous to the health of persons such as those who use and occupy the Church, as detailed more fully in Paragraphs 43 to and including 52, below, which paragraphs are hereby incorporated in this paragraph by reference. Prompted by a pecuniary motive, USG withheld and suppressed this medical and scientific data, depriving the Church of the opportunity to make an informed choice in selecting the acoustical plaster material for the Church.

29. USG's negligence includes its:

(a) failure properly and adequately to advise, instruct, warn, and notify the Church of the dangerous characteristics of asbestos-containing acoustical plaster;

(b) failure properly and adequately to test its asbestos-containing acoustical plaster products;

(c) failure to develop alternative acoustical products when it knew or should have known that asbestos was a disease-causing agent;

(d) failure to offer and provide the Church with alternative acoustical products which were safe and not defective; and

(e) failure to correct or remedy the conditions which were created in the Church.

30. As a direct and proximate consequence of the acts, omissions, willfulness, recklessness, and negligence of USG, the Church was compelled to expend large sums of money to remove USG's acoustical plaster from the Church, has suffered the loss of use of its property and has been otherwise injured.

COUNT III: EXPRESS WARRANTY

31. The Church repeats and realleges each and every allegation contained in Paragraphs 1 through 30 as if fully set forth herein.

32. USG expressly warranted to the Church that its asbestos-containing acoustical plaster was safe and fit for use as ceiling material.

33. The Church and its agents relied upon the aforesaid express warranties of USG.

34. USG breached its express warranties as Audicote was not fit, safe, or suitable for use in the Church.

35. In July 1987, the Church gave timely written notice of breach to USG.

36. As a direct and proximate consequence of USG's breach of its express warranties, the Church has been injured and incurred damages as more fully appears above.

COUNT IV: IMPLIED WARRANTY

37. The Church repeats and realleges each and every allegation contained in Paragraphs 1 through 30 as if fully set forth herein.

38. USG impliedly warranted that its asbestos-containing acoustical plaster was merchantable and fit for use in the Church.

39. The Church and its agents relied upon these implied warranties of USG.

40. USG breached its implied warranties as its asbestos-containing acoustical plaster was not safe, free from defects, merchantable, or fit for use in the Church.

41. As a direct and proximate consequence of USG's breach of its implied warranties, the Church has been injured and incurred damages as more fully appears above.

COUNT V: FRAUD

42. The Church repeats and realleges each and every allegation contained in Paragraphs 1 through 30 as if fully set forth herein.

43. On November 20, 1936, USG and ten other manufacturers of asbestos-containing products signed an agreement to underwrite experiments with asbestos dust to be conducted by Dr. Leroy U. Gardner, at the Saranac Laboratory, Saranac Lake, New York, a research facility which studied pulmonary disease.

44. On November 20, 1936, Vandiver Brown, General Attorney for Johns-Manville Corporation, one of the companies underwriting the Saranac Laboratory research, wrote to Dr. Gardner authorizing him to proceed with research but cautioned him that the results of the research were to be considered the property of the sponsoring companies, which companies were to determine and in what manner the research was to be made

public. The manuscript of Dr. Gardner's study (hereinafter the "Saranac Study") was to be submitted to the sponsoring companies for approval and could be published only in the event the sponsoring companies approved.

45. On February 24, 1943, Dr. Gardner sent to Vandiver Brown an outline of the then current status and findings of the Saranac Study.

46. Brown in turn provided to the other sponsoring companies a copy of the Study outline received from Dr. Gardner.

47. Dr. Gardner's Saranac Laboratory Study experiments revealed, *inter alia*, an 81.8% incidence of malignant lung tumors in mice exposed to "long-fibre" asbestos compared to 18.8% in mice exposed to other dusts. Such findings were deemed by Dr. Gardner as suggestive of the cancer-causing propensity of asbestos dust.

48. In October 1948 Saranac Laboratory sent a draft of the final Study to Brown. On October 27, 1948 Brown, in turn, provided a copy of the Study to USG and the other sponsoring companies and his suggestion that references to cancer and tumors be eliminated from the final, published Saranac Study.

49. On November 11, 1948, representatives of the eleven companies that underwrote the Saranac Study met in the Boardroom of the Johns-Manville Corporation in the City of New York.

50. USG appointed Brown as its agent representative at the November 11, 1948 meeting.

51. The representatives at the November 11, 1948 meeting concluded that all references to cancer or tumors would be omitted from the published version of the Saranac Study.

52. On March 3, 1949, Vandiver Brown wrote to USG and the other sponsoring companies to report the receipt of the revised Saranac Study, incorporating all of the omissions and changes insisted upon by the asbestos industry.

53. The report on the Saranac Study, as thus revised, was published in the January, 1951 issues of the *American Medical Association Archives of Industrial Hygiene and Occupational Medicine.*

54. USG had a continuing duty to disclose the hazards of asbestos to the Church and its agents. USG breached its duty.

55. USG actively concealed its knowledge of the hazards of asbestos from the Church.

56. The Church and its agents purchased and employed USG's asbestos-containing acoustical plaster based upon and in reliance on statements and representations of purported facts made by USG and its agents, including those averred in Paragraphs 9 and 10, above.

57. These statements and representations by USG and its agents included but were not limited to statements that USG's acoustical plaster was safe and fully tested, and suitable and desirable for use in the Church.

58. These statements and representations by USG and its agents were made for the purpose of inducing the Church and its agents to rely thereon and to purchase and use USG's product.

59. Each of the aforementioned statements and representations was false, incomplete, and untrue, was known by USG to be false, incomplete, and untrue when made, and was made with the intention to deceive and defraud the Church into purchasing and using USG's asbestos-containing acoustical plaster.

60. The Church and its agents reasonably relied upon these statements and representations in purchasing and using USG's Audicote, which they would not have done had they known that these statements and representations were false, incomplete, and untrue.

61. As a proximately result of the aforesaid fraudulent misrepresentations, the Church has been damaged as set forth above.

PRAYER FOR RELIEF

WHEREFORE, plaintiff, the First United Methodist Church of Hyattsville demands judgment against United States Gypsum Company, in an amount not presently known but estimated to be in excess of Two Hundred Twenty-Five Thousand Dollars ($225,000.00) for compensatory damages, the cost of this suit including attorneys' fees, and such other and further relief as to the Court may seem proper and just.

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